No. 21-5592

In the Supreme Court of the United States

JOHN HENRY RAMIREZ,

Petitioner,

v.

BRYAN COLLIER, EXECUTIVE DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE, ET AL.

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MOTION OF *AMICUS CURIAE* THE BECKET FUND FOR RELIGIOUS LIBERTY FOR LEAVE FOR PROF. MICHAEL MCCONNELL TO PRESENT ORAL ARGUMENT ON BEHALF OF *AMICUS*, FOR DIVIDED ARGUMENT, AND TO ENLARGE THE TIME FOR ARGUMENT

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Pursuant to Rule 28.7, *Amicus* The Becket Fund for Religious Liberty respectfully moves for leave for its counsel, Professor Michael McConnell, to be allowed to participate in oral argument for 10 minutes, or for such time as the Court deems proper, in addition to the time allocated to the parties. Becket also moves for divided argument and enlargement of the time to accommodate the additional 10 minutes of argument. Both Petitioner and Respondents oppose this motion.

Granting this motion would materially assist the Court by providing adversary presentation on three issues central to the resolution of this case and not substantially addressed by Petitioner or the United States: (1) the Free Exercise Clause claims (on which this Court granted certiorari); (2) the role historic religious practices should play in resolving the merits of Petitioner's claims; and (3) the role historic equity practice should play in resolving Petitioner's claims.

1. On September 7, 2021, Petitioner John Henry Ramirez, a Texas death-row inmate, filed a petition for writ of certiorari with this Court, seeking review of two questions. The first question asked whether "the Free Exercise Clause and Religious Land Use and Institutionalized Persons Act ('RLUIPA')" supported Petitioner's challenge to a ban on touch from his pastor in the death chamber. Pet. i. The second question asked whether "the Free Exercise Clause and Religious Land Use and Institutionalized Persons Act ('RLUIPA')" supported Petitioner's challenge to a ban on audible prayer from his pastor in the chamber. Pet. i. The Court granted certiorari on both questions and stayed the execution.

2. In his subsequent merits brief, Petitioner emphasized his RLUIPA claims, but did not substantially address the Free Exercise Clause claims on which the Court granted review. Petitioner included the following footnote in his brief: "Petitioner's RLUIPA and First Amendment claims seek the same relief, JA 101-02, so Petitioner's brief frames arguments in terms of RLUIPA's requirements to streamline the analysis." Pet.Br.10 n.2. Likewise, the United States—which filed in support of neither party and has now sought argument time—presented no argument on the Free Exercise Clause claims.

3. As Becket explained in its amicus brief, there is a significant question as to whether the First Amendment's Free Exercise Clause protects the religious exercises at issue—audible clergy prayer and clergy touch—independently of statutory protections subject to legislative modification. Becket's brief described centuries of Anglo-American legal history, including pre-Founding history, placing these exercises at the center of historical practices and understandings with respect to clergy access for the condemned. Becket has thus argued that just as historical practices and understandings guide the courts in interpreting most other parts of the Bill of Rights, including the other Religion Clause, those historical practices and understandings should support the Free Exercise claims here. Those arguments are both central to this appeal and unique.

4. The same is true of Becket's arguments regarding the role of historic religious practices and the role of historic equity practices in deciding this appeal. While Pe-

titioner and the United States have not substantially addressed these issues in their briefing, Becket's view is that they are central to the resolution of this appeal.

5. If granted argument time, argument for Becket would be presented by Professor Michael McConnell. Professor McConnell is a professor of law at Stanford Law School, where he heads the Stanford Constitutional Law Center. He is also a former judge of the United States Court of Appeals for the Tenth Circuit and a frequent advocate before this Court. See, *e.g.*, *Carney* v. *Adams*, 141 S. Ct. 493 (2020); *Horne* v. *Department of Agric.*, 576 U.S. 350 (2015). Professor McConnell's writings on how the Religion Clauses are informed by their historical understanding has been cited repeatedly by the Justices of this Court. See, *e.g.*, *Espinoza* v. *Montana Dep't of Revenue*, 140 S. Ct. 2246, 2258 (2020); *Hosanna-Tabor Evangelical Lutheran Church & Sch.* v. *EEOC*, 565 U.S. 171, 183 (2012); *Fulton* v. *City of Philadelphia*, 141 S. Ct. 1868, 1889 (2021) (Alito, J., concurring in the judgment) (discussing Professor McConnell's work as one "of the country's most distinguished scholars of the Religion Clauses"); *City of Boerne* v. *Flores*, 521 U.S. 507, 537 (1997) (Scalia, J., concurring in part) (responding to Professor McConnell as "the most prominent scholarly critic of [*Employment Division* v.] *Smith*"). Professor McConnell has also extensively engaged with questions of free exercise in his prior service as a federal judge. See, *e.g.*, *Colorado Christian Univ.* v. *Weaver*, 534 F.3d 1245 (10th Cir. 2008).

6. In this case, Professor McConnell represents Becket, which has been counsel before this Court in seven merits arguments relating to the free exercise of religion, including *Holt* v. *Hobbs*, 574 U.S. 352 (2015), where this Court applied RLUIPA's

prisoner protections for the first time. Moreover, Becket has decades of experience in prisoner religious liberty litigation, including cases concerning kosher dietary accommodation in Georgia, Florida, Massachusetts, and Texas; Muslim prisoner access to religious literature in California and Louisiana, and a host of other religious liberty claims involving Catholics, Native Americans, Sikhs, and other prisoner plaintiffs. Becket has also filed amicus briefing in support of death-chamber clergy access in *Murphy* v. *Collier*, 139 S. Ct. 1475 (2019), and *Dunn* v. *Smith*, 141 S. Ct. 725 (2021). Professor McConnell will be able to draw on this experience in presenting argument.

7. There is ample precedent for this Court appointing amicus counsel, often legal scholars, to ensure adversarial presentation on important issues resolved below and not fully addressed by the parties. See, *e.g.*, *Collins* v. *Yellen*, 141 S. Ct. 1761 (2021) (Professor Aaron Nielson appointed to defend portion of judgment below not disputed by the parties); *United States* v. *Windsor*, 570 U.S. 744, 755 (2013) (Professor Vicki Jackson appointed to present adversarial argument on jurisdictional issue). This Court has also granted leave to private amici to participate in oral argument when doing so promises to enhance this Court's consideration of the issues, including by scholars and entities with significant background experience. See, *e.g., Dalmazzi* v. *United States*, 138 S. Ct. 576 (2018) (Professor Aditya Bamzai granted leave to address constitutional issue on which the parties had no disagreement); *Pacific Bell Tel. Co.* v. *Linkline Commc'ns, Inc.*, 555 U.S. 438, 447 (2009) (American Antitrust Institute granted leave to present argument defending decision below on

the merits); *Alabama* v. *Shelton*, 535 U.S. 654, 657 (2002) (permitting leave for amicus argument by National Association of Criminal Defense Lawyers in support of respondent, in addition to separate amicus appointed to provide argument in support of judgment below); see also Stephen M. Shapiro *et al.*, Supreme Court Practice § 14.7, at 782 & n.33 (10th ed. 2013).

8. Amicus argument should remain the exception, but this case is one of the exceptions that prove the rule. This appeal has proceeded on an atypical schedule, and the Court will benefit from hearing arguments that better elucidate a crucial constitutional issue that affects many litigants. Moreover, neither Petitioner nor the United States (should it be granted time to argue as amicus) has indicated that it will present argument on the granted petition's First Amendment claims, the role of historic religious practices in defining clergy access to the condemned, or the role of historic equitable doctrines in deciding what relief this or other courts may give Petitioner. Respondent's opposition to those arguments—and the Fifth Circuit's treatment of them below (in particular the Free Exercise Clause)—will therefore receive no adversarial testing at argument. Becket respectfully submits that, under these unique circumstances, the Court would benefit from adversarial oral argument by Professor McConnell on Becket's behalf.

October 1, 2021

Respectfully submitted.

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